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No. 84-890

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER REPLY BRIEF

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AS TO THE FACTS IN THE OPPOSITION BRIEF

1. The Brief in Opposition was generated exclusively from the inaccurate and misrepresentative statement of the case as derived in the Opinion of the Fourth Circuit and not from the trial record and compounds the error of unsubstantiated assertions to force the facts and to torture the law into the four corners of the conclusion. The Government continues to make assertions and to cite as evidence in support of the convictions statements that are totally unsupported by and do not appear in the trial record in that:

a. The evidence at trial does not show that the contract between the motion picture company and the Navy specified that the producer would not contract with any Naval personnel for the performance of services related to the production of the movie. In fact, the only contract between the Navy and the motion picture company was for liability in the event of loss of an aircraft. 3

b. The evidence at trial conclusively proves that petitioner received only reimbursement for out of pocket expenditures applied to upgrade squadron ready room spaces in preparation for the motion picture and for other procurements directly in support of the production; that he was not paid for services rendered; and that he did not personally benefit from the reimbursement transaction. The Government disregards the undisputed testimony at trial of numerous officers that construction work was performed in the squadron spaces; that they had actually participated in that work; and that petitioner had paid for most of it from his own pockets as characteristic of and consistent with his career behavior in support of Navy self-help space improvement programs. Instead, the Government misrepresents the testimony of the movie art director that "no set was built," taking it in isolation to support the gratuity charge. . . 5

c. Petitioner did not "admit to an agent of the Federal Bureau of Investigation that he should have charged the producer for 150 hours of flight time" or that he undercharged for flight hours employed in the production and the overwhelming evidence to the contrary, including the testimony of the Commander, Naval Air Forces

Atlantic Fleet, and five other witnesses proves that such an admission would be totally inconsistent with the facts. . . . 9

d. The telegram petitioner sent to the producer was sent in response to a hesitancy to pay motion picture obligations to the Navy; was sent two months after his receipt of the check in reimbursement and not prior to that transaction as inaccurately asserted by the Government; was authorized by the Air Wing Commander and the Captain of the USS NIMITZ; and was directed toward protection of Government interests. 10

e. The "table making business" was clearly a hobby, not a business, as supported by overwhelming evidence on the record and no profit was gained in any transaction with the Government. The evidence clearly demonstrates that petitioner did not "admit that he made some profit" in the placement of nautical tables in his squadron; that he in fact received only reimbursement for cost of materials in consonance with the Navy self-help facilities upgrade program; and that he in fact contributed extensive labor and made unreimbursed personal expenditures in favor of the Government. 11

f. The record bears no evidence

to support the assertion that the petitioner did not disclose to the Navy his interest in hatch cover tables placed in his squadron spaces or that such interest was of the nature requiring disclosure. 12

AS TO THE ARGUMENT IN INTERPRETATION OF THE LAW IN THE OPPOSITION BRIEF

1. The presentation of both the primary and the lesser included offenses as to bribery and accepting a gratuity invites compromise verdict contrary to constitutional rights of due process and, as instructed to the jury in the instant case, improperly compels a finding of guilt as there is no leeway provided for determination that innocent reimbursement of expenditures while performing an official duty does not conform to the elements of the gratuity offense. 13

2. The "official act performed or to be performed" for which the gratuity was allegedly paid as the critical element of the offense was cited as the undercharging of 150 flight hours, an act which is totally inconsistent with the testimony presented; which has been conclusively proven to be nonexistent; and which, therefore, does not support the offense. 14

3. The Government argument with respect to the gratuity offense that petitioner "did not object to the charge on grounds at trial" that it "failed to indicate that the check petitioner received could not constitute 'anything of value' if it represented reimbursement of funds he expended" and, therefore, that review at this stage is not warranted attempts to substantiate a conviction of the defendant on attorney unawareness and to disregard the fact that reimbursement of expenses does not constitute a gratuity. Similarly, the Government argument as to the issue of notice to defend against a lesser included offense does not address the fundamental issue of due process or the fact the critical elements of the offense are not substantiated. 14

4. The Government's analysis as to the distinctions between bribery and gratuity offenses does not address the issues as they arise in the instant case and, in fact, further substantiates petitioner's argument that the charges were improper. 16

5. The government's argument as to the correctness of the jury instructions on bribery and gratuity and giving the jury the lesser included offense concurrent with the principal offense does not

conform to the respected and well founded opinion presented in United States v. Brewster and is specious. 18

6. The Government argument that "even if the check reimbursed petitioner, it constituted something of value to him, especially where the producer was not obligated to make the payment" is an unconscionable attempt to create "something of value" through manipulation of semantics where there is only recovery of expenditures. 20

7. The Government misconstrues petitioner's argument as to the "financial interest" cited in the conflict of interest statute and relies exclusively on the Opinion of the Fourth Circuit citing only the testimony of the FBI case agent in asserting that there was evidence that "he did profit from the sales" when in fact there was overwhelming evidence to the contrary. 20

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ARGUMENT

Petitioner respectfully requests that the Court review Volume II to the Petition (Pet. Vol. II pp. 21a-97a) which presents the precise language and sequence of testimony from the record. All evidence cited in support of the Government as qualifying

to substantiate the convictions is presented in trial context for review. The Brief in Opposition and the Opinion of the Fourth Circuit are compelling in their mutual assertions as they cite admissions of guilt by the petitioner and pages from the record as evidence; however, there was obviously only limited and isolated review of the record and evidence cited in determination of the fact pattern. Incomplete review and prosecutorial bias is clearly demonstrated by the fact that petitioner did not concede guilt and the only evidence presented in support of the Government was the misrepresented and inaccurately quoted FBI statements.

The Court should be aware that a Navy tribunal was convened to review the convictions as a Government action in continuation of Federal proceedings. The tribunal of senior naval officers had access to

all evidence and witnesses, including documents and officers made unavailable by the Navy for trial. After three months of hearings and deliberations the tribunal issued their report (Pet. Vol. III p. 99a-119a), which asserts specifically that:

> "Commander Brown did not benefit personally from the sale of hatch cover tables, for which he was convicted of conflict of interest." (p. 105a)
>
> "With regard to the conviction of accepting a gratuity, evidence supported the argument that money provided to Commander Brown was in payment for expenses incurred in behalf of the squadron and the movie company ... the payment in no way constituted a gratuity." (p. 106a)
>
> "When considered with all the relevant facts in the case, the Board found these (FBI and NIS) investigations filled with unsubstantiated allegations, many of which were based on rumor and innuendo rather than good objective evidence." (p. 107a).
>
> "The evidence ... supported, in every instance, Commander Brown's version of the events." (p. 110a)

After the conviction, the Justice Department directed the FBI to pursue the

issue as to flight hour undercharges in seeking to recover payments due from the motion picture company. The continuing investigation for the first time generated interviews with squadron pilots who participated in the film and confirmed that the flight hour charges were proper.

AS TO THE FACTS IN THE OPPOSITION BRIEF

1. The Brief in Opposition was generated exclusively from the inaccurate and misrepresentative statement of the case in the Fourth Circuit opinion and not from the record and compounds the error of unsubstantiated assertions to force the facts and to torture the law into the four corners of the conclusion. The Government continues to make assertions and to cite as evidence in support of the convictions statements which the Government knows to be in error; which are inconsistent with trial and subsequent findings; and which are totally unsupported by and do not appear in the record of trial in that:

a. The evidence at trial does not show that the "contract between the motion picture company and the Navy specified that the producer would not contract with any Naval personnel for the performance of services related to the production of the movie." The only contract between the

Navy and the production company was for loss of aircraft liability.

The Government cites the Opinion in misrepresenting facts and mistating the record and is in error in that no such contract existed. According to the Navy Production Officer (Tr. pp. 179-180):

Q And were you the ranking project officer and technical adviser on the film?

A I was the only one.

Q All right. Now, there were no written -- well, were there any written agreements, to your knowledge, between the Navy and any of the production people? ... I'm talking about a contract, an agreement about the things we're talking about, who was to pay what and how they were to be charged. You never signed any written agreements on behalf of the Navy, did you?

A No.

Q And so when you say you participated in negotiations, at least to that extent the understanding and agreement was not reduced to writing, was it?

A Our understandings were not reduced to writing.

The evidence clearly demonstrated that there was no prohibition against having Naval personnel perform services related to the production for which reimbursement of expenses was involved. The entire operation required that Naval personnel perform production related services for which the enlisted men were paid per diem and the Executive Officer of USS NIMITZ accepted a check for the crew from the production for services rendered in further evidence that there was no such contract as asserted by the Government. Even if a contract were tortured into existence, petitioner did not violate provisions alleged by the Government in that he was not paid for services, but was rather reimbursed for expenses (para. 1.b. infra).

b. The evidence at trial conclusively proves that petitioner received only reimbursement for out of pocket expenditures applied to upgrade squadron ready room

spaces in preparation for the motion picture and for other procurements directly in support of the production; that he was not paid for services rendered; and that he did not personally benefit from the reimbursement transaction. The Government disregards the undisputed testimony of numerous officers that construction work was performed in squadron spaces; that they had actually participated in that work; and that petitioner had paid for most of it from his own pockets as characteristic of and consistent with his career behavior in support of Navy self-help programs. Instead, the Government misrepresents the testimony of the movie art director that "no set was built, taking it in isolation, to substantiate the gratuity charge.

In keeping with his responsibility both to the production and to the morale of his men, petitioner reconstructed ready rooms onboard NIMITZ and in the hangar in preparation for filming. Where appropriate as a production charge, he applied his own funds in agreement that he would be reimbursed. Where the renovation exceeded the scope of the production, he applied Navy self-help funds as authorized by the Chief of Naval Operations (Pet. pp. 8, 17-19) . In

addition, he provided other support, in "full cooperation" with the production company, to include purchase of still camera film to chronicle the operation for Navy archives and the company and the purchase of framed squadron prints that were presented to civilian production members. Numerous witnesses confirmed that the transactions were made in the presence and with the approval of the producer with petitioner's own funds (Pet. Vol. II pp. 68a-78a). Navy Chief Roger MacCallum asserted that petitioner paid him by personal check for carpentry in improving squadron spaces (Pet. Vol. II. pp. 69a-74a).

Government assertions that no construction was performed turn on the definition of a "set". Petitioner did not contend that he had constructed a "set" in the connotation of a separate movie set, but that he had renovated ready rooms to be

used as sets for the film. The distinction is of extreme importance as the art director would not have been involved in such activity as it was a government reservation over which he had no control and no authority to modify. Petitioner had no reason for contact with the art director with respect to set construction as the filming was to be on location on NIMITZ or at the hangar, not on a set. According to the art director in brief:

> "A set is a constructed room, landscape, whatever, for the filming of a picture on a sound stage or an exterior location, in case you can't find the actual set." (Tr. p. 345)

> "We could have the NIMITZ to shoot the real thing, rather than build sets. In case NIMITZ was called out to sea and the company would be stuck, waiting in Norfolk till it got back, then the plan was for the company to go shoot the sets that I would design and build in a sound stage or someplace." (Tr. p. 352)

When the art director arrived on location in the ready room, renovation had been

completed. He had a set fully prepared and had no construction requirement. Government manipulation does not counter the overwhelming testimony of direct participants that petitioner had executed the construction projects.

c. Petitioner did not "admit to an agent of the Federal Bureau of Investigation that he should have charged the producer for 150 hours of flight time" or that he undercharged for flight hours employed in the production and the overwhelming evidence to the contrary, including testimony of the Commander, Naval Air Forces Atlantic Fleet, and five other witnesses proves conclusively that such an admission would be totally inconsistent with the facts.

Petitioner never told the agent that he should have charged or that he undercharged the motion picture company for flight hours. Undisputed testimony confirmed that the Navy agreement was for the motion picture company to pay for thirty flight hours; that all other flights were legitimate training charges; and that petitioner conformed explicitly to the

agreement and to the guidance of his superiors. There was no undercharging of flight hours. (Pet. Vol. II pp. 26a-62a). The FBI testimony directly supports petitioner contention that he acted in conformance with Navy guidance in charging for the agreed amount of flight hours.[1]

d. The telegram petitioner sent to the producer was in response to a hesitancy to pay production obligations to the Navy; was sent two months after receipt of the check in reimbursement and not prior to that transaction as inaccurately asserted by the Government; was authorized by the Air Wing Commander and the Captain of USS NIMITZ; and was directed toward protection of Government interests.

The telegram was not produced and no one other than petitioner testified as to the actual content. Government assertions are purely speculative and inconsistent with the facts presented and the Government has confirmation that the officers cited did, in fact, authorize the telegram. (Pet. Vol. II pp. 55a-62a).

e. The "table making business" was clearly a hobby, not a business, as supported by overwhelming evidence on the record and no profit was gained in any transaction with the Government. Petitioner did not "admit that he made some profit" in the placement of nautical tables in his squadron. The record confirms that he received only reimbursement for cost of materials in consonance with the Navy self-help facilities upgrade program and that he in fact contributed extensive labor and made unreimbursed personal expenditures in favor of the Government.

Testimony corroborated the contention that the name "Binnacle Enterprises" was only a means for tracking a separate checking account; that there was no business, either formal or informal, in operation; and that what the Government contended was a "company" was the making of 21 hatch tables in the garage over a five year period, many of which were <u>given</u> to Navy activities. The transactions for which conflict of interest was alleged generated net loss to petitioner and extraordinary gain to the Government.

Petitioner was operating in conformance with the Navy self-help facilities upgrade program and the Chief of Naval Operations objectives in improving appearance of squadron spaces and quality of life of Naval personnel. (Pet. pp. 7-8, 17-21, and Pet. Vol. II pp. 84a-97a).

f. The record bears no evidence to support the assertion that petitioner did not disclose to the Navy his interest in the hatch tables placed in his squadron spaces or that such interest was of the nature requiring disclosure.

Petitioner's hobby was well known by Navy officials as directed toward the benefit of the Navy; his Air Wing Commander personally had a table; the Fighter Wing office and BOQ had tables provided at no cost; and petitioner was cited by the Atlantic Fleet Commander expressly for placing nautical tables in his squadron spaces. (Pet. pp. 17-21).

The transactions did not mandate

disclosure of any financial interest as there is no financial interest in reimbursement for cost of materials.

AS TO THE ARGUMENT IN INTERPRETATION OF THE LAW IN THE OPPOSITION BRIEF

1. The presentation of both the primary and the lesser included offenses as to bribery and accepting a gratuity invites compromise verdict contrary to constitutional rights of due process and, as instructed to the jury in the instant case, improperly compels a finding of guilt. There is no leeway provided for determination that innocent reimbursement of expenditures while performing an official duty does not conform to the elements of the gratuity offense.

The Government notes that petitioner was charged with 20 major counts that were disposed of on acquittal, which included all of the original counts in the information employed to secure prosecution of the case.[2] That a compromise verdict was the ultimate aim cannot be disputed when considered with all relevant facts. The issue is well developed and requires no

further clarification (Pet. pp. 32-42).

2. The "official act performed or to be performed"[3] for which the gratuity was allegedly paid as the critical element of the offense was cited as the undercharging of 150 flight hours, an act totally inconsistent with the evidence on record.

Undisputed testimony of six witnesses on record proves that this act did not occur which eliminates the object of the criminal offense (see p. 9-10, supra, and Pet. Vol. II pp. 26a-55a, 63a-84a).

3. The Government argument with respect to the gratuity offense that petitioner "did not object to the charge on grounds at trial" that it "failed to indicate that the check petitioner received could not constitute 'anything of value' if it represented reimbursement of funds he expended" and, therefore, that review at this stage is not warranted attempts to substantiate a conviction of the defendant on attorney unawareness and to disregard the fact that reimbursement of expenses does not constitute a gratuity. Similarly, the Government argument as to the issue of notice to defend against a lesser included offense does not address fundamentals of due process or the fact the critical elements of the offense are not present.

Petitioner's argument is that he was convicted for a charge against which he

did not defend as a result of attorney unawareness of a vague and obscure statutory provision and that legal precedent must stand on a firmer foundation than one built on Government trickery and misrepresentation or attorney error. The issue from the Government perspective is form over substance. Defendant is deprived of his liberty and property, not the attorney who is responsible for ensuring a complete defense. Would the Government interpret the law similarly if a defendant were innocent of murder charges and carry forward the mandate on a death sentence because his attorney was unaware of the statute and failed to defend against the charge. The cases cited by the Government have not been subjected to review by the Supreme Court. If such is to be the law, then this factor should be considered in the aggregate with the substantial array

of errors, misrepresentations and products of overzealous prosecutorial conduct.

4. The Government's analysis as to the distinctions between bribery and gratuity offenses does not address the issues as they arise in the instant case and, in fact, further substantiates petitioner's argument that the charges were improper.

The Government argues that bribery:

> "makes necessary an explicit quid pro quo which need not exist if only an illegal gratuity is involved" in asserting that "the difference is that a bribe causes the official act to be performed, while an illegal gratuity may be paid because of an official act even if that act would have been performed in the absence of payment."

The argument further asserts that:

> "there was evidence to support a distinction here: the money was not paid until after the petitioner had understated the hours to his superior, and there was no evidence of a prior agreement between the petitioner and the producer."

Assuming, arguendo, that the Government were in fact correct, the bribery charge was meritless and should not have been a jury question. On this Government

theory, only the gratuity charge should have been presented to the jury, not both charges as a shopping list. Brewster[4] is directly on point (Pet. pp. 38-40).

As to the statement that "the act would have been performed in the absence of payment", the argument is convoluted and meaningless. The producer agreed to pay the Navy for only thirty hours. Had the Navy charged the company for flight time required to transfer airplanes to Key West (30 hours), there would have been no allocation remaining for actual filming.

The argument that Harary[5] is misplaced is ineffective. The Government stands by the interpretation that petitioner accepted a gratuity in return for undercharging the production by $400,000. This charge can be nothing less than bribery and requires specific "corrupt intent".[6] The Government cannot color intentional

undercharging of flight hours in return for compensation as anything less than bribery. Petitioner asserts affirmatively that had such been the case, then he should properly have been charged with bribery and not with gratuity.

The only reference to an undercharge for flight hours was the purely speculative FBI statement (see p. 9-10, supra and n.1). Absent an objective element, intent is without substance.

5. The government's argument as to the correctness of the jury instructions on bribery and gratuity and giving the jury the lesser included offense concurrent with the principal offense does not conform to the respected and well founded Brewster[7] opinion.

In addition to his concurrent responsibilities as a squadron commander to prepare the squadron for imminent overseas deployment, petitioner was assigned an official duty to coordinate the filming of a major motion picture and to "provide full

cooperation" with the production company. As detailed (see pp. 7-9, supra), he applied his own funds to reconstruct ready rooms in preparation for filming understanding that he would be reimbursed. The instruction to the jury by the Court read:

> "... that the defendant was given the money as a result of the performance of an official duty that he was required to do or to perform as a Navy officer or that he had been ordered to perform as a Navy officer and that he accepted the money." (Pet. p. 36)

Reimbursement was not noted. Petitioner did accept the money as a result of performance of an official duty as did Navy support personnel and the NIMITZ Executive Officer in accepting payments from the production company as a result of performance of official duties in support of the film. There was no personal gain and no criminal activity; however, were the jury presented with the same instruction, they would have

to convict. The instruction is contoured to color a legal act as a criminal offense.

6. The Government argument that "even if the check reimbursed petitioner, it constituted something of value to him, especially where the producer was not obligated to make the payment" is an unconscionable attempt to create something of value through manipulation of semantics where there is only recovery of expenditures.

The Government argument is specious. Congress could not possibly have intended the interpretation proffered. Reimbursement taken in Government perspective means that an Admiral who pays for a contractor's lunch out of expediency fully expecting and subsequently receiving reimbursement has received "something of value" and is guilty of accepting a gratuity.[7] Petitioner was likewise reimbursed, not paid for services, and the record is devoid of evidence to the contrary. (Pet. Vol. II pp. 63a-84a).

7. The Government misconstrues petitioner's argument as to the "financial interest" cited in the statute and relies in error on the Fourth Circuit Opinion citing

the testimony of only the FBI agent as evidence that "he did profit from the sales" when in fact there was overwhelming evidence to the contrary.

As to "financial interest,"[8] the petition is on point (Pet. 47-56) as to distinctions between conduct that offends the statute and conduct that is "too remote or too inconsequential to affect the integrity of Government officers' services."[9] The Government argues that substantiality applies only to participation in the transaction; however, there must be some minimum standard for defining a financial interest. If there is no profit; if the only gain accrues to the Government; if labor is contributed without compensation; if there is no forseeable potential benefit to the officer; if the transaction is reimbursement for materials procured; then a "financial interest" does not attach. Grassetti[10] specifically applies (Pet. pp. 48-49)

The profit issue is without substance (Pet. Vol. II pp. 84a-97a). In brief, the only evidence cited that a profit was made is the assertion by the FBI agent that:

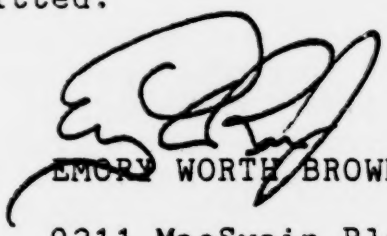
> "Commander Brown indicated he got no profit from the sale of these tables, but when it was pointed out that materials would not count for the purchase price, he indicated that he possibly made a profit on some of the tables." (Pet. Vol. II pp. 94a-95a)

Evans[11] asserts that the purpose of conflict of interest laws is to eliminate clouded judgment by Government officers, preferential treatment, inefficient management and the temptation to act contrary to the best interests of Government. Petitioner's professional record as evidenced by official reports of officer fitness (Pet. Vol. III pp. 120a-153a) belies any of these proscribed elements.

CONCLUSION

The Government in the Brief in Opposition is not responsive to the questions presented or the issues addressed in the petition. The aggregate of errors in the instant case gives rise to grievous violation of Constitutional due process and fundamental fairness. The resultant precedent could be extremely detrimental to Government and military transactions and to intercourse between the Government and the commercial sector. The petition for a writ of certiorari should be granted.

Respectfully submitted.



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APPENDIX

NOTES

[1]Testimony of the FBI case agent as to the petitioner in brief:

> "He indicated that he, on official records, had flown 32.5 hours for the production of the movie; however, he indicated that he could have charged Mr. Douglas for at least a hundred and fifty hours." (p. 27a)
>
> "He carefully reviewed each flight hour and decided to charge the production company only the time actually spent for filming and charge the other flight hours against the allocated hours for the squadron." (p. 28a)
>
> "When he refigured the flight hours spent in support of the movie, he took out such things as the time spent on deck for refueling, the time taken in transit from the base to the area where the filming was done, and the down time while the planes were flying but no actual photographing was taking place." (p. 29a)
>
> "All crew members in the squadron who were involved in the filming of the movie were consulted regarding the hours charged to the movie company and knew that Brown was only charging the movie company for hours spent in filming." (p. 29a)

[2]Petitioner was acquitted on one count of bribery (18 U.S.C. 201(c)), six counts of theft of government property (18 U.S.C. 641), nine counts of making a false state-

ment (18 U.S.C. 1001), and four counts of conflict of interest (18 U.S.C. 208(a)). The theft and false statement counts were rejected by the jury primarily because of the testimony by Commander Robert Brich who had Navy responsibility for control of the equipage for which petitioner was charged; who was available to the Government for interview and who actively sought to bring his evidence to the attention of the Government at the beginning and throughout the investigatory period; and who was never consulted prior to trial. Commander Brich confirmed that petitioner had conformed to all Navy regulations with respect to the equipage; that petitioner had directed the proper inventory and custody of all motion picture related materials; and that he, Commander Brich, personally assumed responsibility for his own failure to execute the direction given him with respect to material accountability. He confirmed that petitioner had never attempted to conceal any materials; that a full inventory was on file both at the command and at the Headquarters of the Commander, Naval Air Forces Atlantic Fleet; that the petitioner had never been directed to return the materials as had been alleged by the proseution; that his possession was temporary and proper; and that the matter of signatures on custody cards was no more than an administrative task awaiting completion. (Tr. pp. 771-815). The Government had no basis to any of the charges levied which substantiates the prosecutorial tactic of excessive delineation of counts to foster a compromise verdict.

[3]18 U.S.C. 201(g).

[4]United States v. Brewster, 506 F.2d 62, 68.

[5]United States v. Harary, 457 F.2d 471, 477.

[6]18 U.S.C. 201(a).

[7]506 F.2d 62, 68.

[8]18 U.S.C. 208(a).

[9]18 U.S.C. 208(b).

[11]Grassetti v. Weinberger, 408 F.Supp 142 (N.D.C. 1976)

[8]United States v. Evans, 572 F.2d 455, 480 (5th cir. 1978).